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No. 82-6686

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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May, 1983

JUN 2 PAGE 10

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved . .	2
Statement of the Case	5
Reasons Why the Writ Should be Denied	8
I. SINCE A PREVIOUS EVIDENTIARY HEARING REVEALED THAT THE NONDISCLOSED REPORTS WOULD NOT HAVE AFFECTED THE OUTCOME OF THE TRIAL, PARTICULARLY IN VIEW OF THE FACT THAT THE PETITIONER'S ATTORNEY PERSONALLY SPOKE TO THE WITNESSES REFERRED TO IN THE REPORTS AND THEREAFTER DECLINED TO CALL THEM AS WITNESSES AT THE EVIDENTIARY HEARING, THE MANDATES OF UNITED STATES V. AGURS HAVE BEEN COMPLIED WITH AND THE PRESENT PETITION FOR WRIT OF CERTIORARI, WHICH PRESENTS ISSUES WHICH HAVE PREVIOUSLY BEEN PRESENTED TO THIS COURT, SHOULD BE DENIED.	8
II. THE HOLDING OF THIS COURT IN ENMUND V. FLORIDA DOES NOT PREVENT THE STATE FROM IMPOSING THE SENTENCE OF DEATH UPON A PARTICIPANT IN A MURDER WHERE, AS EVIDENCED BY THE ACTIONS OF THAT PARTICIPANT, HE, AT THE VERY LEAST, "CONTEMPLATED THAT LIFE WOULD BE TAKEN."	11
III. SINCE THE TRIAL COURT AND THE OKLAHOMA COURT OF CRIMINAL APPEALS BOTH APPLIED THE PRINCIPLES OF ENMUND V. FLORIDA AND FOUND THAT THE PRESENT CASE WAS FACTUALLY DISTINGUISHABLE FROM THAT IN ENMUND, NO ERROR WAS COMMITTED.	14
Conclusion	15
Affidavit of Service	15

TABLE OF AUTHORITIES

Cases

	Page
Brady v. Maryland, 373 U.S. 83 (1963)	11
Briggs v. Raines, 652 F.2d 862 (9th Cir. 1981) . . .	10
Chaney v. Oklahoma, No. 81-6016 (Cert. denied U.S. April 5, 1981)	1, 9
Chaney v. Oklahoma, No. 80-947 (Cert. denied U.S. March 23, 1981)	1
Chaney v. State, No. PC-82-487 (Okl.Cr. February 3, 1983)	1
Chaney v. State, No. PC-81-345 (Okl.Cr. November 12, 1981)	1
Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980)	1, 11, 14
Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982)	9, 11, 12, 13, 14, 15
Smith v. Phillips, 455 U.S. 209 (1982)	9
United States v. Agurs, 427 U.S. 97 (1976)	9, 10, 11

Constitutional Provisions

U.S. Const., Amend. VIII	2
U.S. Const., Amend. XIV	2

Statutes

21 O.S.Supp.1976, § 701.7	2, 5
21 O.S.Supp.1976, § 701.9	2
21 O.S.Supp.1976, § 701.10	2, 3
21 O.S.Supp.1976, § 701.11	3
21 O.S.Supp.1976, § 701.12	3
21 O.S.Supp.1976, § 701.13	4
28 U.S.C. § 1257(3)	2

QUESTIONS PRESENTED

1. Whether the nondisclosure of statements of purported witnesses, with whom the Petitioner's attorney spoke prior to a post-conviction evidentiary hearing and then declined to call to testify at that hearing, was violative of this Court's mandate in United States v. Agurs, 427 U.S. 97 (1976).

2. Whether this Court should grant certiorari to review the question stated above when it has declined to do so when the Petitioner brought this same issue before the Court in a previous Petition for Writ of Certiorari.

3. Whether this Court's holding in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982), should affect the death sentence imposed in this case given the involvement of the Petitioner in the kidnapping and subsequent murder of his victims.

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The Respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Oklahoma Court of Criminal Appeals in this case.

OPINIONS BELOW

The last opinion of the Oklahoma Court of Criminal Appeals is an unreported Order Affirming Denial of Post-Conviction Relief, Chaney v. State, No. PC-82-487 (Okl.Cr. February 3, 1983).

Previous to that is another Order Affirming Denial of Post-Conviction Relief, which was issued by the Oklahoma Court of Criminal Appeals on November 12, 1981, Case No. PC-81-345. This Court denied certiorari in that case on April 5, 1982, in Case No. 81-6016.

The original opinion of the Oklahoma Court of Criminal Appeals, a direct appeal in which the court affirmed the death sentence imposed by the district court, was issued on May 15, 1980, and is reported as Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980). This Court denied certiorari in that case on March 23, 1981, in Case No. 80-947.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on February 3, 1983. By order entered March 25, 1983, Justice White granted an application extending Petitioner's time

to file a petition for writ of certiorari until May 4, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eight Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 21 O.S.Supp.1976, § 701.7, provides as follows:

> "A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.
>
> "B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

Title 21 O.S.Supp.1976, § 701.9, provides in part:

> "A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S.Supp.1976, § 701.10, provides as follows:

> "Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determin whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted

before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11, provides as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12, provides as follows:

"Aggravating circumstances shall be:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remunderation;

"4. The murder was especially heinous, atrocious or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13, provides as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

Larry Leon Chaney (hereinafter referred to as the Petitioner) was charged by Information in the District Court of Tulsa County, State of Oklahoma, with the crime of Murder in the First Degree in violation of 21 O.S.Supp.1976, § 701.7.

The Petitioner was convicted of murdering a woman nameed Kendal Inez Ashmore by strangulation. In the second stage, the State further introduced evidence that the defendant had also strangled a young woman named Kathy Ann Brown, who was a horse trainer in the employ of Mrs. Ashmore and who was kidnapped with Mrs. Ashmore.

The facts that the State presented at trial revealed that on March 17, 1977, the deceased's husband, Phillip Ashmore, left his residence for work. Mr. Ashmore was in the construction business; and he and his wife also were engaged in the business of raising Morgan horses at their residence, which was on a farm. Mr. Ashmore's wife, the decedent, Kendal Ashmore, came to his office at approximately 9:30 a.m. on March 17, 1977, and picked up the family pickup truck. Mr. Ashmore never saw his wife alive again.

Mr. Ashmore returned to his home later that afternoon and found that neither his wife nor the employee, Kathy Ann Brown, were there. After he rounded up the horses, Mr. Ashmore received a telephone call in which the caller stated that he had "got your old lady and that honky that works for you and I want a half million dollars in one hundred dollar bills." (Tr. 351). The caller promised to phone the next night with instructions regarding the delivery of the money. The caller also stated that, if anyone heard about the call, "I'll do to your wife what I did to that honky that works for you" (Tr. 351-352). Mr. Ashmore immediately called his attorney, who then contacted the Federal Bureau of Investigation. A recording device was then affixed to his telephone, but no more calls from the extortionist were received on that day.

The next day, March 18, Mr. Ashmore and his father-in-law secured the ransom money and returned to the Ashmore home. At approximately 7:00 p.m., a person with the same voice called

again and directed Mr. Ashmore to take the money to a rodeo ground and leave it at a specified spot by 7:30 p.m. or his wife would be killed (Tr. 363). Shortly after that time, Mr. Ashmore delivered the money to the predesignated spot at the rodeo grounds. At approximately 9:30 p.m. the same day, he received another call from a man with the same voice who advised him that he had not left the money in the proper place, that he should get the money, and that he would receive another call the next night. The caller stated that if Mr. Ashmore did not do exactly what he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, motherfucker" (Tr. 373). Mr. Ashmore did not receive any more calls concerning his wife.

The call which was made at approximately 7:00 p.m. directing Mr. Ashmore to the rodeo grounds was traced to the Petitioner's telephone number at his residence. The call which was made at approximately 9:00 p.m. was traced to a service station phone booth. The Petitioner's palmprint was taken from the receiver handle on that telephone.

After receiving this information, the police set up surveillance at the Petitioner's home, which was within two (2) miles of the rodeo grounds where the ransom money was to be delivered; and on March 19, at 3:20 a.m., the police arrested the Petitioner and searched his house, looking for the victims or evidence of the victims' whereabouts.

A search of a wastepaper basked in the Petitioner's residence revealed torn-up pieces of paper which, when reassembled, contained the words, "Richard Elloit," 1:00 P.M." and "Thursday" and the number "299-9791" (Tr. 579). A note in Mrs. Ashmore's handwriting found at her home contained the words "1:00 o'clock, Thursday" and "Richard Eliot" (Tr. 384). The Ashmore's home telephone number, which was the number which the extortionist called, was 299-9791 (Tr. 342). A handwriting expert testified that the notations on the torn piece of paper found in the wastepaper basket in the Petitioner's residence were made by the Petitioner (Tr. 1199). Furthermore, the Petitioner's fingerprints were found on this note (Tr. 588-589).

Later that morning, at approximately 9:00 a.m. on March 19, the pickup in which Mrs. Ashmore had been driving was found at a location near south Tulsa. In the back of the pickup was found half of a piece of paper. According to an FBI expert, the other half of the paper was the one which was found in the Ashmores' home as referred to above. The note found in the Ashmore home also gave the location where the pickup truck was found on the morning of March 19.

Finally, on March 22, 1977, the body of Mrs. Ashmore was found in a shallow grave on the Petitioner's property near the City of Sallisaw, a town approximately 100 miles east of Tulsa. Her body was bound and gagged and she had been strangled with a strip of a towel.

The State also presented witnesses who placed the Petitioner in the area near where Mrs. Ashmore's body was found on the day of the kidnapping, including a neighbor of the Petitioner who saw Petitioner driving his truck on that property late on the afternoon of the kidnapping. Furthermore, on the afternoon of the kidnapping, the Petitioner was observed in a convenience store near Sallisaw, within five or six miles of the burial site, by a witness who testified that the defendant appeared dirty and had dirt stains on his pants from the knees down.

Furthermore, on the night before the kidnapping, the Petitioner checked into a motel near Sallisaw. The operator of the motel testified that, after the Petitioner checked out the next morning, he found that three bath towels were missing and that there was red clay-like mud on the bedspread (Tr. 659).

The property where Mrs. Ashmore's body was buried was being rented by the Petitioner, who was building a house at this location. A pick-ax which was found at the Petitioner's residence when he was arrested was found to have soil particles on it similar to that at the location where the bodies were buried.

The jury found the Petitioner guilty; and in the second stage of the proceeding, the State introduced evidence that Kathy Ann Brown, the horse trainer who had worked for Mrs. Ashmore and who also had been missing, had also been bound, gagged, strangled and

buried in the same grave with Mrs. Ashmore on the Petitioner's property. The Petitioner introduced evidence in mitigation, which included a stipulation concerning the Petitioner's alleged heroism in saving a person from a burning truck on an earlier occasion.

The jury returned the verdict imposing the death penalty and found that four aggravating circumstances existed:

> 1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.
>
> 2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 in money from the family of Kendal Inez Ashmore.
>
> 3. The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
>
> 4. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against said defendant for the kidnapping charge.

The jury specifically found that the aggravating circumstances were not outweighed by any mitigating evidence which had been presented.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

SINCE A PREVIOUS EVIDENTIARY HEARING REVEALED THAT THE NONDISCLOSED REPORTS WOULD NOT HAVE AFFECTED THE OUTCOME OF THE TRIAL, PARTICULARLY IN VIEW OF THE FACT THAT THE PETITIONER'S ATTORNEY PERSONALLY SPOKE TO THE WITNESSES REFERRED TO IN THE REPORTS AND THEREAFTER DECLINED TO CALL THEM AS WITNESSES AT THE EVIDENTIARY HEARING, THE MANDATES OF UNITED STATES V. AGURS HAVE BEEN COMPLIED WITH AND THE PRESENT PETITION FOR WRIT OF CERTIORARI, WHICH PRESENTS ISSUES WHICH HAVE PREVIOUSLY BEEN PRESENTED TO THIS COURT, SHOULD BE DENIED.

This is the third time the Petitioner has filed a Petition for a Writ of Certiorari with this Court with regard to the death sentence imposed upon him by a jury in the District Court of Tulsa County and which has been upheld by the Oklahoma Court

of Criminal Appeals on direct appeal and in two separate post-conviction attacks.

In his second Petition for Writ of Certiorari to this Court, Larry Leon Chaney v. Oklahoma, No. 81-6016, the Petitioner made the identical claims concerning the alleged withholding of exculpatory evidence which he is making in his present Petition. After the denial of the Petitioner's second Petition for Writ of Certiorari, this Court issued its opinion in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982). In the present Petition, the Petitioner has carefully couched his argument regarding the alleged withholding of exculpatory evidence in terms of the holding of Enmund in an attempt to have this Court accept certiorari on grounds identical to those upon which certiorari has previously been denied. A review of the "Questions Presented" portion of the previous Petition (attached hereto as Appendix "A") reveals this fact.

The only intervening circumstance has been this Court's decision in Enmund v. Florida, supra, which, for reasons stated in Proposition II, should not affect the validity of the death sentence in the present case.

Enmund v. Florida, supra, did nothing to change this Court's previous decisions regarding exculpatory evidence. The standard announced by this Court in United States v. Agurs, 427 U.S. 97 (1976), still applies. See also, Smith v. Phillips, 455 U.S. 209 (1982).

In United States v. Agurs, supra, this Court held that, when there has been a defense request for specific evidence, the failure to disclose such will mean reversal if nondisclosure "might have affected the outcome of the trial." 427 U.S. at 104. Assuming for the moment that a specific request was made,[1] the State submits that the mandates of Agurs have not been breached.

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[1] The request made was so expansive (see the Petitioner's Petition, p. 3) it should be considered to be a general request and, therefore, should fall under the third type of nondisclosure enunciated under Agurs, with reversal occurring only if the omitted evidence would create "a reasonable doubt that did not exist." Id., at 109-112.

It is appropriate to conduct an evidentiary hearing to determine whether the principles set forth in Agurs have been violated. Briggs v. Raines, 652 F.2d 862, 865-66 (9th Cir. 1981). In the present case, an evidentiary hearing was conducted by the trial court on May 1, 1981, pursuant to the Petitioner's first Application for Post-Conviction Relief. This hearing was conducted prior to the Petitioner's second Petition for a Writ of Certiorari to this Court.

At this hearing, the Petitioner's attorney called only one witness, the District Attorney, Mr. Fallis, to testify concerning the reports that were not disclosed (P.C. Tr. 5).

At this point it is most significant to note that Mr. Smallwood, the Petitioner's attorney, admitted at the close of the hearing that he had spoken personally with several of the witnesses whose testimony he claims is so important and declined to call any of those persons to testify as to the information they possessed (P.C. Tr. 38).

Furthermore, the District Attorney, Mr. Fallis, explained the lack of significance of the testimony of the witnesses referred to in the nondisclosed reports. As to the witness, Poppy Weaver, who allegedly observed the victim at a time which the Petitioner claims would have been inconsistent with the prosecution's theory of the case (Petition, pp. 4-5), Mr. Fallis testified that, when contacted previously, Ms. Weaver stated that she could not identify this woman as being Mrs. Ashmore, the victim (P.C. Tr. 25). Mr. Smallwood, the Petitioner's attorney, specifically admitted talking to this witness and yet declined to call her to testify at the post-conviction evidentiary hearing (P.C. Tr. 38).

Regarding the second witness, Mr. Hamilton (Petition pp. 5-6), Mr. Fallis explained that the pickup had been discovered thirty minutes prior to Mr. Hamilton's siting and that the person he saw was an employee of the victim's husband (P.C. Tr. 24). Again, it should be noted that Mr. Smallwood also spoke to Mr. Hamilton personally and declined to call him as a witness at the evidentiary hearing (P.C. Tr. 38).

With regard to the third witness, a schoolboy who observed a "red pickup" during the day when the Ashmore pickup was found (Petition p. 6, n. 6), the exculpatory nature of this evidence is not apparent and Mr. Smallwood did not even interview this witness nor subpoena him to appear at the evidentiary heairng (P.C. Tr. 38).

In view of the fact that the Petitioner's attorney interviewed these witnesses, yet declined to call them as witnesses at the evidentiary hearing, it can hardly be claimed that these witnesses possess information which would be useful to the Petitioner if he were granted a new trial.

Furthermore, the trial judge who presided over the jury trial of the Petitioner and who conducted the evidentiary hearing discussed above filed a five-page order in which he applied the principles of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, supra (Order Denying Application for Post-Conviction Relief, July 27, 1981). The court also noted that "the evidence in the trial of this case established one of the strongest cases against a criminal defendant that the Court has witnessed as a trial judge." Id., p. 4. The facts as set forth in the Statement of the Case and the opinion of the Oklahoma Court of Criminal Appeals also support this judgment. See, Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980).

II.

THE HOLDING OF THIS COURT IN ENMUND V. FLORIDA DOES NOT PREVENT THE STATE FROM IMPOSING THE SENTENCE OF DEATH UPON A PARTICIPANT IN A MURDER WHERE, AS EVIDENCED BY THE ACTIONS OF THAT PARTICIPANT, HE, AT THE VERY LEAST, "CONTEMPLATED THAT LIFE WOULD BE TAKEN."

After this Court denied the Petitioner's second Petition for a Writ of Certiorari, it issued its opinion in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982). The State submits, however, that the mandates of Enmund should in no way affect the death sentence which has been imposed in the present case.

In Enmund, the Court set aside a death sentence in a case involving an accomplice who was, at best, 200 yards from the scene of the robbery in which two victims were shot to death by

Enmund's accomplices.[2] There was no showing that Enmund anticipated that anything more than a robbery would take place. This Court held that, under the facts of the case, the punishment was disproportionate to the crime charged and thus violated the Eighth Amendment.

The present case differs greatly from that in Enmund. In Enmund the Court was concerned with a case where "minimal participation" in a capital felony resulted in the death penalty. 51 U.S.L.W. at 5090. The Court reversed the judgment because the Florida Supreme Court "affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." 51 U.S.L.W. at 5092.

In the present case, however, the evidence reveals the Petitioner's deep involvement in the crime from beginning to end. The following facts are indicative of his direct involvement in the abduction and subsequent murder of Mrs. Ashmore and her employee, Kathy Brown:

> (1) The victim's husband, Mr. Ashmore, received a telephone call from a man who stated that he had "got your old lady and that honky that works for you and I want a half a million dollars in one hundred dollar bills" (Tr. 351).
>
> (2) The next day he received a telephone call from a man with the same voice who ordered Mr. Ashmore to take the money to a designated area at a rodeo grounds or his wife "would be killed." This telephone call was traced to the telephone number of the Petitioner's residence, where he was arrested some eight hours later.
>
> (3) Approximately 2½ hours after Mr. Ashmore received the telephone call directing him to the rodeo grounds and threatening the life of his wife, a third

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[2] Justice White observed that the Florida Supreme Court held that "the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape." 51 U.S.L.W. at 5089.

telephone call was made to Mr. Ashmore by a man with the same voice, which stated that if Mr. Ashmore did not do exactly what he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, motherfucker" (Tr. 373). This call was traced to a pay telephone booth where the Petitioner's palm print was taken from the telephone receiver handle.

(4) When the Petitioner was arrested at his residence, the residence was searched and a piece of paper was found in the trash can. Upon the piece of paper, in the Petitioner's handwriting and upon which appeared the Petitioner's fingerprints, was the Ashmore's telephone number (the number where Mr. Ashmore received the three ransom calls) and the number "9148," which was the Ashmore's street address and the name "Richard Elliott" and "1:00 o'clock, Thursday," which were the person Mrs. Ashmore was to meet and the day and time of the meeting.

(5) When the bodies of Mrs. Ashmore and Kathy Ann Brown were found, it was discovered that they had been bound, gagged and strangled with strips of a towel. The operators of a motel near where the bodies were found testified that the Petitioner had stayed at that motel the night before Mrs. Ashmore was kidnapped and that several towels were missing after he checked out. One of the operators also testified that the room where the Petitioner stayed had a red clay-like mud on the bedspread.

(6) The property where the bodies were uncovered had been rented by the Petitioner several months earlier and he had been building a house thereon.

(7) When the Petitioner was arrested, a pick-ax was found at his residence which was found to have soil particles on it which were similar to the soil at the location where the bodies were buried.

(8) The Petitioner was observed driving in the area near the burial site late in the afternoon of the kidnapping and during the same time period was seen in a nearby convenience store in a dirty condition and with dirt from his knees down.

It is, therefore, readily apparent that the Petitioner, at the very least, "contemplated that life would be taken." Enmund v. Florida, supra, 51 U.S.L.W. at 5092. Furthermore, the fact that it is conceivable that someone else may have been involved in the abduction and murder of Mrs. Ashmore and Kathy Ann Brown does not diminish the "blameworthiness" of the Petitioner. Enmund v. Florida, supra, 51 U.S.L.W. at 5099 (O'Connor, J. dissenting).

The State submits that the facts of this case reveal the Petitioner's direct culpability in a most savage crime. The Court of Criminal Appeals observed that "this case is one of the most heinous and cruel cases considered by this Court." Chaney v. State, supra, 612 P.2d at 283. The Petitioner's argument that the punishment that the State is attempting to impose upon him is "constitutionally excessive" cannot succeed and the State contends that the punishment selected for the Petitioner's involvement is not disproportionate to the crime committed.

III.

SINCE THE TRIAL COURT AND THE OKLAHOMA COURT OF CRIMINAL APPEALS BOTH APPLIED THE PRINCIPLES OF ENMUND V. FLORIDA AND FOUND THAT THE PRESENT CASE WAS FACTUALLY DISTINGUISHABLE FROM THAT IN ENMUND, NO ERROR WAS COMMITTED.

The Petitioner alleges that the district court rejected his Enmund claim because of its "presumption" that "'Enmund is of prospective application only" (Petition, p. 16). However, a review of the district court's order of August 9, 1982 (Petition, Appendix B), reveals that this contention is not accurate.

While the district court did make the comment that it presumed that Enmund was of prospective application (Order, p. 5, n. 4), it "assum[ed], arguendo, that Enmund will at some future date be granted retroactive effect, and thus be made chronologically applicable to these 1977 circumstances" (Order p. 5). The district court then proceeded to devote five pagen of its order

to a detailed discussion of Enmund and an application of it to the facts of the present case (Order, pp. 5-10).

Therefore, this allegation by the Petitioner has no merit.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

David W. Lee

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ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

David W. Lee, of lawful age and being first duly sworn, upon his oath does state:

1. I am a member of the bar of this Court.

2. I served the above and forgoing Respondent's Brief in Opposition to Certiorari on all parties by placing copies in the United States Mail, First Class Mail, postage prepaid, addressed as follows:

Allen M. Smallwood
1310 South Denver Ave.
Tulsa, OK 74119

Jack Greenberg
James M. Nabrit, II
John Charles Boger
10 Columbus Circle
New York, NY 10019

Anthony G. Amsterdam
New York University Law School
40 Washington Square South
New York, NY 10012

3. All parties required to be served have been served.

Further, affiant sayeth not.

DAVID W. LEE

Subscribed and sworn to before me this 27th day of May, 1983.

NOTARY PUBLIC

My Commission Expires:
September 14, 1985

mag